Hanafiah bin Muhammad v Southern Bank Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–24–901 OF 2004
MOHD HISHAMUDIN J
31 AUGUST 2007

Auctions and Auctioneers — Procedure — Public auction — Error in address of property in proclamation of sale and newspaper advertisement — Deputy registrar merely announced mistake in auction room on the day of auction and then corrected error in proclamation notice and court's file — Whether deputy registrar should have postponed the sale and reissued a fresh proclamation notice — Auction Sales Enactment 1929 (FMS Cap 81) s 4

Civil Procedure — Declaration — Whether correct procedure in the circumstances — Error in address of property in proclamation of sale and newspaper advertisement — Whether owner of property plaintiff should have appealed instead of applying for declaration that address stated in proclamation was not his property — Whether error was minor or misleading — Whether plaintiff prejudiced

The plaintiff at the material time was the owner of a condominium unit known as Unit L7-03-E1 Block 7, Bungaraya Condominium, having its postal address as 7A-03-03 Bungaraya Kondo Saujana Resort, Seksyen U2 40150 Shah Alam. For the purpose of the purchase of the condominium unit from the vendor/developer, the plaintiff applied for and obtained a loan from the first defendant bank. But as at the time of the application of the loan the condominium unit did not yet have a strata title, the plaintiff's rights under the sale and purchase agreement with the vendor/developer vis-a-vis the property was assigned to the bank as security under a loan cum assignment agreement. The plaintiff defaulted on the repayments of the loan. Hence, the first defendant commenced foreclosure proceeding against the plaintiff for a sale order pursuant to O 83 of the Rules of the High Court 1980. The order for sale was issued by the High Court of Kuala Lumpur on 5 September 2000. Thereafter, pursuant to a summons for directions before the Deputy Registrar, the first date of public auction was appointed by the Deputy Registrar: it was at 13 December 2000. The public auction eventually took place on 16 February 2004. Prior to this auction date of 16 February 2004, the proclamation of sale was issued and advertised in the newspaper by the court appointed auctioneers (the fourth and fifth defendants). But rather

unfortunately the postal address in the proclamation was wrongly stated as being Unit No 7B-03-01 3rd Floor, Block 7B, Bunga Raya Condominium 41200 Subang Selangor Darul Ehsan. The first defendant's valuer alerted the first defendant of this mistake by a letter dated 14 February 2004. Hence, on the day of the public auction (16 February), before the commencement of the public auction, the first defendant's officer/representative who was present at the auction room informed the auctioneer and the deputy registrar of the High Court having charge of the auction sale of the mistake in the proclamation. The deputy registrar and the auctioneer then announced to the members of the public present in the auction room of the mistake and made the necessary corrections in the proclamation notice and in the court's file. Thereafter, the public auction was carried out, and the second and third defendants were the successful bidders. The plaintiff being dissatisfied applied for the following declarations: (1) that he was the lawful owner of a property known as Unit L7-03-E1, Block 7 which has a postal address known as 7A-03-03 Bungaraya Kondo Saujana Resort, Seksyen U2, 40150 Shah Alam; and (b) that he was not the owner of a property known as Unit No 7B-03-01 held under a master title known as PT 74, H S (D) 86887 Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan.

Held, dismissing the originating summons with costs:

(1) A declaration is not the right remedy in this case. If the plaintiff is aggrieved with the error in the proclamation of sale and the newspaper advertisement, as to the postal address of the property in question, then what should have been prayed for in the instant originating summons is an order to set aside the sale that was carried out by the deputy registrar as being null and void. Or, alternatively, the plaintiff should have appealed to the judge in chambers pursuant to O 56 of the Rules of the High Court 1980 against the decision of the deputy registrar of the High Court in proceeding with the auction in spite of the objection by the plaintiff. Certainly it was not appropriate as a matter of law to ask for a declaration (see para 10).

(2) In any case, clearly it did not make sense to apply for the two declarations prayed for; since, after all, it was not disputed by the defendants that the plaintiff was the lawful owner of the condominium unit in question, that the description of the postal address of the property in question in the proclamation of sale was factually not correct; and that there was no intention on the part of the defendants to hold a public auction in respect of Unit No 7B-03-01. Secondly, the error was a minor technical error and the plaintiff knew what was intended to be sold by public auction under the proclamation and advertisement was his condominium Unit No L7-03-E1, Block 7,

Bunga Raya Condominium. There was no evidence that members of the public were misled by the error; or that the plaintiff was in any way prejudiced. Thirdly, the plaintiff was aware of the pending auction to be held on 16 February 2004 and the mistake in the proclamation well in advance before the date of the auction (even way back to the proclamation advertised in the year 2000), but he, however, took no action to alert the either the auctioneers or the deputy registrar of the court of the error (see paras 11–13).

(3) Section 4 of the Auction Sales Enactment 1929 (FMS Cap 81) has already been duly complied with when the licensed auctioneers published the proclamation of sale in the Malay Mail. There was no necessity to postpone the auction as the mistake was minor and technical in nature and members of the public including the plaintiff was not in any way misled or prejudiced. In fact the plaintiff himself turned up for the auction, and there were several bidders. And not only that: the plaintiff had advanced knowledge of the mistake way back to the year 2000 (when the first proclamation was issue) but had kept quiet, and only on the very day of the auction itself that he notified the deputy registrar of the mistake regarding the address in the notice of proclamation (see para 16)

[Bahasa Malaysia summary

Plaintif pada setiap masa material adalah pemilik sebuah kondominium yang dikenali sebagai Unit L7-03-E1 Blok 7, Bungaraya Kondominium, yang mempunyai alamat pos di 7A-03-03 Bungaraya Kondo Saujana Resort, Seksyen U2 40150 Shah Alam. Untuk tujuan pembelian unit kondominium daripada penjual/pemaju, plaintif telah memohon dan mendapatkan pinjaman daripada bank defendan pertama. Akan tetapi pada masa permohonan pinjaman unit kondominium masih belum mempunyai hakmilik strata, hak-hak plaintif di bawah perjanjian jual beli telah diserah hak kepada bank sebagai jaminan di bawah perjanjian pinjaman merangkap serah hak. Plaintif telah mengingkari pembayaran balik pinjaman. Dari itu, defendan pertama telah memulakan prosiding perampasan harta terhadap plaintif untuk perintah penjualan menurut A 83 Kaedah-Kaedah Mahkamah Tinggi 1980. Perintah penjualan telah dikeluarkan oleh Mahkamah Tinggi Kuala Lumpur pada 5 September 2000. Selanjutnya, menurut saman minta arahan di hadapan Timbalan Pendaftar, tarikh pertama lelongan awam telah ditetapkan oleh Timbalan Pendaftar: iaitu pada 13 Disember 2000. Lelongan awam akhirnya dibuat pada 16 Februari 2004. Sebelum tarikh lelongan awam 16 Februari 2006 ini, perisytiharan penjualan telah dikeluarkan dan diiklankan dalam surat-surat khabar oleh jurulelong yang dilantik oleh mahkamah (defendan keempat dan kelima). Akan tetapi malangnya alamat pos dalam perisytiharan adalah telah tersilap dinyatakan sebagai Unit No

A 7B-03-01 Tingkat 3, Block B7, Bunga Raya Condominium 41200 Subang, Selangor Darul Ehsan. Jurunilai defendan pertama telah memaklumkan defendan pertama akan kesilapan tersebut melalui surat bertarikh 14 Februari 2004. Dari itu, pada hari lelongan awam (16 Februari), sebelum bermulanya lelongan awam, pegawai/wakil defendan pertama yang hadir dalam bilik B lelongan telah memaklumkan jurulelong bahawa timbalan pendaftar Mahkamah Tinggi yang bertugas tentang jualan lelong telah membuat kesilapan dalam perisytiharan. Timbalan pendaftar dan jurulelong kemudiannya mengumumkan kepada orang-orang awam yang hadir dalam bilik lelongan tentang kesilapan dan telah membuat pembetulan yang C sewajarnya dalam notis perisytiharan dan fail mahkamah. Selanjutnya, lelongan awam pun dijalankan, dan defendan kedua dan defendan ketiga adalah pembida yang berjaya. Plaintif yang tidak berpuas hati memohon untuk perisytiharan-perisytiharan berikut: (1) bahawa beliau adalah pemilik sah untuk hartanah Unit L7-02-E1, Blok 7 yang mempunyai alamat pos D sebagai 7A-03-03 Bungaraya Kondo Saujana Resort, Seksyen U2, 40150 Shah Alam: dan (b) bahawa beliau bukan pemilik hartanah yang dikenali sebagai Unit 7B-03-01 di bawah hakmilik master dikenali sebagai PT 74, H S (D) 86887 Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan.

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Diputuskan, menolak saman pemula dengan kos:

(1) Perisytiharan bukanlah remedi yang betul dalam kes ini. Jika plaintif F adalah pihak yang ditindas berikutan kesilapan dalam perisytiharan jualan dan pengiklanan akhbar, kepada alamat pos hartanah yang dipersoalkan, apa yang perlu dipohon dalam saman pemula ini adalah perintah untuk mengenepikan penjualan yang telah dijalankan oleh timbalan pendaftar sebagai batal dan tidak sah. Atau, secara G alternatinya, palintif seharusnya merayu kepada hakim dalam kamar menurur A 56 Kaedah-kaedah Mahkamah Tinggi 1980 terhadap keputusan timbalan pendaftar Mahkamah Tinggi dalam prosiding berkaitan lelongan meskipun terdapat bantahan dari plaintif. Sudah tentu ia adalah tidak wajar dari segi perundangan untuk H memohon satu perisytiharan (lihat perenggan 10).

(2) Dalam sebarang kes, jelasnya ia dalah tidak masuk akal bagi memohon dua perisytiharan, memandangkan, akhirnya, ia tidak dipertikaikan oleh defendan-defendan bahawa plaintif adalah pemilik sah kepada unit kondominium yang dipersoalkan, bahawa gambaran alamat pos I hartanah yang dipersoalkan dalam perisytiharan jualan sebenarnya tidak betul faktanya; dan tiada ada sebarang niat di pihak defendan-defendan untuk menjalankan lelongan awam bagi Unit No 7B-03-01. Kedua, kesalahan adalah kesilapan teknikal yang kecil dan plaintif mengetahuinya apa yang diniatkan bagi jualan dalam lelongan

awam di bawah perisytiharan dan pengiklanan adalah condominiumnya iaiatu Unit No L7-03-E1, Blok 7, Bunga Raya Kondomiunium. Tiada ada sebarang bukti bahawa orang-orang awam telah dikelirukan oleh kesilapan; atau bahawa plaintif dalam apa-apa keadaan telah diprejudiskan. Ketiga, plaintif mengetahui berkenaan dengan lelongan yang akan dijalankan pada 16 Februari 2004 dan kesilapan terdahulu dalam perisytiharan sebelum tarikh lelongan (walaupun semasa perisytiharan diiklankan dalam tahun 2000), tetapi beliau, walaubagaimanapun, tidak mengambil sebarang tindakan untuk memaklumkan sama ada kepada jurulelong atau timbalan pendaftar mahkamah berkenaan kesilapan (lihat perenggan 11–13)

(3) Seksyen 4 Enakmen Jualan-jualan Lelong 1929 (FMS Cao 81) telahpun dipatuhi apabila jurulelong berlesen mengeluarkan perisytiharan jualan dalam Malay Mail. Tiada keperluan untuk menangguhkan lelongan kerana kesilapan adalah kecil dan bersifat teknikal dan orang-orang awam termasuklan plaintif tidak dalam apa-apa keadaan telah dikelirukan dan juag diprejudiskan. Plaintif juga telah hadir untuk lelongan, dan juga terdapat beberapa pembida yang lain. Dan bukan itu sahaja: plaintif mempunyai pengetahuan berkenaan kesilapan sebelum itu lagi iaitu pada tahun 2000 (bila perisytiharan pertama dikeluarkan) tetapi telah berdiam diri, dan hanya pada hari lelongan beliau telah memaklumkan timbalan pendaftar kesilapan berkenaan alamat dalam notis perisytiharan (lihat perenggan 16).]

Notes

For a case on whether correct procedure in the circumstances, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2105.

For cases on auctions and auctioneers in general, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1682–1697.

Legislation referred to

Auction Sales Enactment 1929 s 4
Rules of the High Court 1980 O 56, O 83

S Bala (SBS Maniam Associates) for the plaintiff.
Kingston Tan (Heily Hassan, Tan & Partners) for the first defendant.
CS Hoe (The Law Chambers of CS Hoe) for the second and third defendants.
KL Wong (Dennis Nik & Wong) for the fourth and fifth defendants.

Mohd Hishamudin J:

[1] This originating summons is an application by the plaintiff for the following declarations:

A (a) that he is the lawful owner of a property known as Unit L7–03–E1, Block 7 which has a postal address known as —

7A–03–03 Bungaraya Kondo Saujana Resort,

Seksyen U2

B

40150ShahAlam

and which is held under a master title known as PT 74, HS(D) 86887 Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan; and

C (b) that he is not the owner of a property known as Unit No 7B–03–01 held under a master title known as PT 74, HS(D) 86887 Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan.

I had dismissed the originating summons with costs.

D **[2]** The facts of the case are not disputed. The plaintiff at the material time was the owner of a condominium unit known as Unit L7–03–E1 Block 7, Bungaraya Condominium, having its postal address as —

7A–03–03 Bungaraya Kondo Saujana Resort,

E Seksyen U2,

40150 Shah Alam.

F **[3]** For the purpose of the purchase of the condominium unit Irom the vendor/developer, the plaintiff applied for and obtained a loan from the first defendant bank ('Southern Bank'). But as at the time of the application of the loan the condominium unit did not yet have a strata title (there was only the master title HS(D) PT 74 86887 Mukim Damansara), the plaintiffs rights under the sale and purchase agreement with the vendor/developer vis-a-vis the property was assigned to the bank as security under a loan cum assignment agreement (the strata title was subsequently issued by the Land Office in August 2002: however, when the present originating summons was filed in May 2004, the strata title issued was still registered under the name of the vendor/developer). The plaintiff, however, defaulted on the repayments of the loan. Hence, the first defendant commenced foreclosure proceeding against the plaintiff for a sale order pursuant to O 83 of the Rules of the High Court 1980. The order for sale was issued by the High Court of Kuala Lumpur on 5 September 2000. Thereafter, pursuant to a summons for directions before the Deputy Registrar, the first date of public auction was appointed by the Deputy Registrar: it was at 13 December 2000. The reserved price was fixed by the Deputy Registrar at RM648,000.

[4] For some reasons the public auction did not take place on 13 December 2000; neither on some other dates thereafter (there was also an occasion when the auction was aborted due to absence of bidders). The public auction eventually took place but this was much later, that is, on 16 February 2004. Prior to this auction date of 16 February 2004, the proclamation of sale was issued and advertised in the newspaper by the Court appointed auctioneers (the fourth and fifth defendants). But rather unfortunately the postal address in the proclamation was wrongly stated as being —

Unit No 7B–03–01

2nd Floor, Block 7B,

Bunga Raya Condominium,

41200 Subang,

Selangor Darul Ehsan.

[5] The first defendant's valuer alerted the first defendant of this mistake by a letter dated 14 February 2004. Hence, on the day of the public auction (16 February), before the commencement of the public auction, the first defendant's officer/representative who was present at the auction room informed the auctioneer and the Deputy Registrar of the High Court having charge of the auction sale of the mistake in the proclamation. The Deputy Registrar and the auctioneer then announced to the members of the public present in the auction room of the mistake and made the necessary corrections in the proclamation notice and in the court's file. Thereafter, the public auction was carried out, and the second and third defendants were the successful bidders.

[6] In the present case, the fourth defendant was the auctioneer that carried out the public auction on 16 February 2004, under the supervision of the Deputy Registrar of the High Court. The fourth defendant was the director of the fifth defendant at the material time. I shall now deliver my grounds.

[7] Firstly, on the facts of the case, I do not think that a declaration is the right remedy. The plaintiff claims that he is unhappy with the way the public auction was carried out on 16 February 2004 by the auctioneers and Deputy Registrar of the High Court. In particular, he is aggrieved by the fact that there was an error in proclamation advertised in the Malay Mail issue of 3 February 2004 which described the property to be auctioned as having the following postal address:

Unit No 7B–03–01,

2nd Floor, Block 7B,

A Bunga Raya Condominium,

41200 Subang,

Selangor Darul Ehsan.

B **[8]** In his supporting affidavit, the plaintiff asserts that he is the lawful owner of a property situated at Unit No L7–03–E1 at Building Block 7, held under a master title known as PT 74, HS(D) 86887, Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan. The plaintiff further avers that he had on the day of the auction but prior to the auction pointed out to the C Deputy Registrar and the appointed auctioneers of the error on the proclamation and had objected to the auction being proceeded with.

[9] It is to be observed that the order of sale that has been previously issued by the Court is not disputed; nor is the description of the master title in the D proclamation and advertisement (that is, PT 74, HS(D) 86887, Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan). It is also not disputed that the property in question is known as Unit No L7–03–E1, Blok 7, Bungaraya Kondo.

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[10] Now, in my judgment, if the plaintiff is aggrieved with the error in the proclamation of sale and the newspaper advertisement, as to the postal address of the property in question, then what should have been prayed for in the instant originating summons is an order to set aside the sale that was F carried out by the Deputy Registrar as being null and void. Or, alternatively, the plaintiff should have appealed to the Judge in Chambers pursuant to O 56 of the Rules of the High Court 1980 against the decision of the Deputy Registrar of the High in proceeding with the auction in spite of the objection by the plaintiff. Certainly it is not appropriate as a matter of law to ask for G a declaration.

[11] In any case, to my mind, and with respect, clearly it does not make sense to apply for the two declarations prayed for; since, after all, it is not disputed by the defendants that the plaintiff is the lawful owner of the H condominium unit in question, that the description of the postal address of the property in question in the proclamation of sale was factually not correct; and that there was no intention on the part of the defendants to hold a public auction in respect of Unit No 7B–03–01. In fact on the day of the auction itself, in the auction room, prior to the carrying out of the auction, the I Deputy Registrar and the fourth defendant (the auctioneer) had taken steps (and, I would say, correctly) to announce to those present in the auction room of the mistake in the description of the postal address in the proclamation; and, thereafter, the Deputy Registrar had appropriately made the necessary corrections in the proclamation and in the court's file.

[12] Now, be that as it may, even if the plaintiff insists on seeking a declaration, as has happened in the present case, and taking the hypothesis that the plaintiff is entitled to ask for a declaration, then, shouldn't the declaration that is sought be worded differently, that is, a declaration to the effect that the sale via the public auction to the second and third defendants was null and void by reason of the said error in the proclamation (instead of in the manner the prayers for declarations are presently worded)? In the light of the issue at hand, the prayers sought by the plaintiff, as presently worded, are meaningless (if not confusing).

[13] Secondly, the error was a minor technical error and the plaintiff knew what was intended to be sold by public auction under the proclamation and advertisement was his condominium unit No L7–03–E1, Block 7, Bunga Raya Condominium. There was no evidence that members of the public were misled by the error; or that the plaintiff was in any way prejudiced. On the contrary members of the public turned up for the auction, and there were several bidders; and the property was sold off to the 2nd and 3rd defendants as the successful bidders. Indeed, the plaintiff was also present at the auction (but had objected to the carrying out of the sale by reason of the mistake in the proclamation). In other words, in the present case, the plaintiff was making, mountain out of a mole hill.

[14] Thirdly, the plaintiff was aware of the pending auction to be held on 16 February 2004 and the mistake in the proclamation well in advance before the date of the auction (even way back to the proclamation advertised in the year 2000), but he, however, took no action to alert the either the auctioneers or the Deputy Registrar of the Court of the error.

[15] The plaintiff's counsel submitted that it was wrong for the Deputy Registrar to have merely announced the mistake in the auction room on the day of the auction and then to have corrected the error in the proclamation notice and in the Court's file. The learned counsel submitted that, since the plaintiff prior to the auction had objected to the sale being proceeded with by reason of the error, the Deputy Registrar should have postponed the sale and reissued a fresh proclamation notice, referring to s 4 of the Auction Sales Enactment 1929 (FMS Cap 81). The provision reads —

Notice of sale.

(1) Every auctioneer shall before conducting a sale by public auction give public notice thereof, setting out the particulars of the property to be offered for sale, and stating the time and place at which the auction will be held.

A (2) Such notice shall be given not less than seven days before the date fixed for the auction; provided that with the permission in writing of the Chief Police Officer the period of such notice may be reduced to two days.

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[16] With respect, I am unable to accept learned counsel's submission. In my view, the above provision has already been duly complied with when the licensed auctioneers published the proclamation of sale in the Malay Mail. There is no necessity to postpone the auction as the mistake was minor
C and technical in nature and members of the public including the plaintiff was not in anyway misled or prejudiced. In fact the plaintiff himself turned up for the auction, and there were several bidders. And not only that: the plaintiff had advanced knowledge of the mistake way back to the year 2000 (when the first proclamation was issue) but had kept quiet, and only on the very day of
D the auction itself that he notified the Deputy Registrar of the mistake regarding the address in the notice of proclamation.

Originating summons dismissed with costs.

E Reported by Loo Lai Mee

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